

Enquiries: Rolph Vos
Phone : (03) 6323 9300
Fax : (03) 6323 9349

22 December, 2011

Re: AGM 2011 Motion – Smoke By-Law

Dear Clive

I write regarding your motion, submitted in writing, to the West Tamar Council 2011 Annual General Meeting. Firstly I can confirm that your motion was tabled at the meeting on the 15th of November. Secondly I can advise that the Councillors expressed concern regarding the issue of smoke generated by burning and the significant impacts you experience personally.

It was the decision of the meeting, that in light of the specifics of your request, Council should seek legal advice before determining how to proceed. I met with Council's solicitor regarding this matter on the 21st of November. We discussed in some detail the *Environmental and Pollution Control (Distributed Atmospheric Emissions) Regulations 2007* and the legality of a by-law of the type you propose.

I subsequently received **written** advice from Council's solicitor, on the 6th of December, which I presented to Councillors at their meeting on the 20th of December. I have included the advice below:

Regulation 11 of the Environmental Management & Pollution Control (Distributed Atmospheric Emissions) Regulations 2007 provides that a person must not burn waste or fuel in the open air or in an incinerator on land that has an area of less than 2,000 m² unless certain exemptions apply. It is notable that a person may burn vegetation or paper as exemptions. A further exemption is that the burning occurs in accordance with a by-law made by a council under the Local Government Act 1993.

Sub-regulation 11(2) says that a person must not burn waste or fuel in the open or in an incinerator on land which has an area of 2,000 m² unless certain exemptions apply. They include burning vegetation or paper. This regulation does not include as an exemption burning in accordance with a council by-law.

Clearly council cannot make a valid by-law if it is inconsistent with a regulation made under EMPCA. Inconsistency might be direct or indirect. Indirect inconsistency occurs where one can conclude that the regulation intends to and does "cover the field" with respect to a particular subject matter.

Here the regulation expressly contemplates a by-law which controls burning on land of less than 2,000 m².

In my view it is clearly the case that council may make a by-law to control burning on land of less than 2,000m² because regulation 11(1) specifically contemplates it.

But it does not follow that council can have a by-law which regulates burning on land which is an area of more than 2,000 m² if the person concerned does so in accordance with regulation 11(2). I think that this regulation covers the field in respect of burning waste that is unpainted or uncontaminated wood, vegetation, paper, charcoal or peat. If these are the things that council wishes to regulate by a by-law for burning on land of more than 2,000 m², then I do not think that the by-law would be valid. That is because regulation 11(2) confers a right to undertake such burning in accordance with the regulation and it follows that council could not legislate inconsistently with this right pursuant to a by-law.

As I'm sure you can appreciate, this advice leaves no room for Council to proceed with your request for the creation of a by-law to control burning on land which has an area in excess of 2000m².

While this is clearly of no assistance to you and closes the door on an avenue you were hopeful would in time bring you some relief I believe that the Tasmanian State Government has been quite deliberate in the wording of the legislation. I would respectfully suggest that in order to address this situation you will need to lobby for legislative change at the state level.

Yours faithfully



Rolph Vos
Development Services Manager